IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7114 OF 2005

Maniklal Futurmal Baldota .. ..Petitioner

Versus

M/s.Volga Ice Cream and Ors. .. ..Respondents

Mr.N.V.Walawalkar with L.D.Vakil i/b Ram & Co. for petitioner

Mr.Paneel Anand for respondent nos.1 and 2

CORAM : P.V.KAKADE, J.

DATE : 4TH APRIL, 2006

P.C.:

1. Heard the learned counsel for the petitioner as well as Respondent nos.1 and 2. Advocate for Respondent no.3 is not present, however, Mr.Helekar holds for advocate for respondent no.3 and seeks adjournment. However, in view of the facts and circumstances, as

revealed from the record, there is no necessity to adjourn the matter, as the merits of the dispute are not being touched while disposing of this petition.

2. The petitioner-plaintiff has filed this petition against the judgment and order passed by District Judge, Pune dated 8.8.2005 allowing the appeal and passing the order to the effect that the judgment and decree dated 30.8.1997 passed by Addl. Judge of Small Causes Court, Pune in Civil Suit NO.534/1988 is set aside. Further it was directed that the suit be remanded with direction to frame the preliminary issues, to hear both the parties on preliminary issues and then to decide the said issues, and if the issues are decided in negative, and he shall decide the suit afresh on merits.

3. The petitioner-plaintiff filed the suit against the present respondents for eviction from the suit premises on various grounds. The trial judge on the basis of the pleadings raised as many as 11 issues and pertaining to the pleadings and on the basis of available evidence came to the conclusion that the plaintiff had proved that the defendant no.1 had committed breach of terms and conditions of the lease-deed. It was further

held that the respondent-defendant had illegally sublet the premises, and suit premises was reasonably and bonafide required by the plaintiff. Issue of greater hardship was held in favour of the plaintiff and it was held on the basis of these findings that the petitioner-plaintiff was entitled to get possession of the suit premises as well as other consequential reliefs.

4. At this juncture, it should be noted that the respondents in fact made an application to the trial court to raise preliminary issue regarding maintainability of the suit on various grounds and that application was not adjudicated upon and remained just on record without any order whatsoever.

5. On this ground the appeal was preferred by the respondent before the District Court. The learned District Judge after hearing the parties came to the conclusion that the other issues on merits should not be taken into account and only point for consideration was framed to the effect that whether the preliminary issues relating to the locus-standi of the Respondent no.1 to file the suit and the maintainability of the suit arise in the present case. The said point was answered in

affirmative and it was found that the trial judge had committed an error in deciding the suit when it was held that suit is not maintainable and as such the impugned order, as noted above, came to be passed. Hence, the present petition.

6. After hearing both the parties and taking into account the settled legal position, there is no doubt whatsoever that the appellate court was within its powers to remand the suit with direction to frame preliminary issue and further giving direction to the trial court that both the parties should be heard on merits in respect of preliminary issue and on that ground the suit was remanded. However, while doing so, the learned District Judge has set aside the judgment and decree dated 30.8.1997 passed by the Small Causes Court and has further directed that if the preliminary issue was answered in the negative then the trial judge shall decide the suit afresh on merits.

7. In my considered view, the lower appellate court has fallen in error on two counts viz. (1) that the judgment and decree of the trial court is totally set aside and (2) that the suit is directed to be decided

afresh on merits. It is needless to mention that when the suit in fact was decided on merits recording findings on all the raised issues, there was absolutely no reason to issue direction to the effect that the suit be decided afresh on merits. Moreover, if the remand order was to be passed, then it was open for the lower appellate court either to send the preliminary issues for hearing and recording finding thereon keeping the appeal pending, and/or sending the preliminary issues for hearing on merits keeping intact the findings recorded by the trial court on other issues. In other words, if the trial court came to the conclusion that on the basis of preliminary issue, the suit was not maintainable, the entire suit would have been disposed of. On the other hand, if the trial court came to the conclusion that the suit was maintainable, then there was no reason to issue direction that the issues, which were already adjudicated on merits should be heard and decided afresh by the trial court.

8. The learned counsel for the petitioner brought to my notice the ruling of the Apex Court in the case of **Pratima Sinha and Ors vs. Shashi Kumar Narain Sinha and ors. reported in (2004) 13 SCC 599**, which supports this view. Therefore, without entering into the merits of the

dispute between the parties, this petition can be disposed of on above noted procedural aspect, which in my considered view, the District Judge should have decided in aforesaid manner.

9. Hence, the petition is partly allowed. The judgment and order passed by the District Judge, Pune dated 8.8.2005 is hereby set aside and the order is substituted as follows :

> (a) The direction given by the District Judge, Pune regarding remanding of the suit with direction to frame preliminary issues, after giving opportunity to both the parties to lead evidence, if any, and decide it on merits remains good in law. However, setting aside the entire judgement and decree passed by the trial court and further direction to decide the suit afresh on merits, if the preliminary issues are answered in negative are hereby quashed and set aside for the reasons recorded above.

10. The trial court is directed to frame the preliminary issues as per the direction of the District Judge, Pune so as to adjudicate it on merits after giving opportunity to both sides to lead evidence, if any, on or before 31st August, 2006. If the trial court comes to the conclusion that the suit is not maintainable in law, then the question to adjudicate the issues further would not arise. However, if the trial court comes to the conclusion that the suit is maintainable in law, then the parties would be at liberty to approach the lower appellate court against the said findings as well as the findings recorded by the trial court by judgment dated 30.8.1997. With these directions the petition stands disposed of with no order as to costs.

11. It is clarified that all the rights and contentions of both the parties are left open.

12. Both the parties shall appear before the Trial Court on 24th April 2006 at 11.00 a.m. for the purpose mentioned herein above.

13. It is also brought to my notice by respondents

that there is some typographical mistake pertaining to the date of registration of the sale deed in the judgment of the lower court. The respondents are at liberty to move the lower appellate court for correction, if any.